United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1451

To be argued by
DAVID W. MC CARTHY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN MATTHEW BOSTON
ERNEST MOORE,

Appellants.

BRIEF FOR APPELLANT JOHN MATTHEW BOSTON

ON APPEAL FROM A JUDGMENT
OF CONVICTION ENTERED IN
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- JOHN MATHEW BOSTON and ERNEST MOORE Appellants.	Docket Nos. 71 CR 682

QUESTIONS PRESENTED

1. Whether the appellant's arrest was based upon probable cause and, therefore, the evidence seized incident thereto properly admitted at trial?

2. Whether the search of 1212 Loring Avenue was in violation of the Fourth Amendment as having been conducted without a valid consent, or, alternatively, as having been conducted without a warrant under circumstances indicating no emergency, or, alternatively, as "fruit of the poisonous tree."

3. Whether appellant was denied a fair trial and due process of law by the manner of photographic display and identification and was such identification testimony the "fruit of the poisonous tree," or a derivative exploitation of the original illegal arrest.

4. Whether the alleged confession by appellant was obtained in violation of his Fifth Amendment rights, having failed to waive his right to remain silent and to have an attorney, or, alternatively, as "fruit of the poisonous tree," a derivative of the illegal arrest, or, alternatively, as a coerced confession.

5. Did the District Court Judge's charge with respect to accomplice testimony constitute reversible error.

PRELIMINARY STATEMENT

John Matthew Boston appeals from a judgment, entered January 30, 1974, before District Court Judge Mark A. Costantino, with a jury, convicting him of armed bank robbery and bank robbery (18 U.S.C. 2113 (a) and 2113 (d))

On April 5, 1974, appellant was sentenced by Judge Costantino to imprisonment for twenty years on each of the counts, to be served concurrently.

On April 8, 1974, notice of appeal was duly filed and counsel, who had been appointed pursuant to the Criminal Justice Act in the District Court, was continued as assigned counsel on appeal.

STATEMENT OF FACTS

On June 2, 1971, the National Bank of North America, Baisley Boulevard Branch, was robbed by three armed men. Among other employees of the bank present were Joseph Dente, the branch manager, John Jackson, the bank guard, and George Intellisano, the assistant manager. All three testified at a pre-trial hearing. Mr. Intellisano did not testify at the trial.

THE HEARING

JOSEPH DENTE observed three men during the robbery. One of them leaped the teller's counter. This man he identified as John Boston. Although the robbery took about ten minutes,

the first three to five of them Mr. Dente was looking out the window. He therefore observed the perpetrators for a period of three to five minutes, and was unable to provide a description of the man he later identified as John Boston. (33, 64, 70-72)* Candidly, he acknowledged that prior to exposure to photographs and to appellant in prior hearings** had precluded his recollection of the image of the individual himself. (70-71) Indeed, he was unable to remember whether the man had a scar, sideburns or any other distinguishing characteristics, but remembered that he was black and had no moustache. (71, 73, 192) The perpetrator was not wearing sunglasses. (95) After the robbery, Mr. Dente provided a description to the agents, stating that all three perpetrators were five feet nine inches, Negro, and about 180 pounds. (132) He described Boston as having a darker complexion than the other two. (132, 116)

Within a week of the robbery, Loretta Moss, another employee of the bank, exhibited to Mr. Dente a newspaper clipping regarding the arrest of two suspects and containing their pictures. (60, 78) The article stated that the two men had been arrested, and that the purported proceeds of the robbery had been recovered. (83)

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*Numbers in ( ) refer to pages of the minutes of the hearing.

**In September, 1971, a pre-trial hearing with respect to a motion to suppress was held before Judge Leo Rayfiel. Appellant's plea of guilty entered during the hearing was later withdrawn, pursuant to an order of this court dated July 23, 1973.(without opinion) (Mulligan, Mansfield and Hays J.J.)

Mr. Dente thought that everyone had viewed the pictures and discussed the matter contained in the article. (79, 84) He also read an article in Newsday relative to the apprehension of the persons, but it contained no photographs. (79)

On August 4, 1971, FBI Agent William Jones displayed an array of photographs to Mr. Dente. (Government's exhibits 1 through 8) (38, 40) He did not immediately choose a picture, but perused the spread two or three times before selecting Government's Exhibit 1 (photograph of appellant) and saying, "I think this is the man who jumped the counter." (110, 113, 188) At the time he made his selection, he knew that two men had been arrested purportedly possessing the proceeds of the robbery. (106, 108) The person shown in Government's exhibit was at the same time identical and not identical to appellant. He was certainly dissimilar in that his hair style was shorter and he had a moustache. (98-104, 146, 192) However, the spread contained only three other photos that resembled Boston. (94)

In any event, Mr. Dente was shown Government's exhibits 1 through 8 two to three more times since August 4, 1971. (88) The second time he saw them, he chose exhibit 1 upon his first perusal of the array. (113) He was shown the photos at least once more before the September 1971 hearing, and once again before the 1973 hearing. (89, 195) When he viewed the photographs again in 1974, he remembered that they were the same he saw in 1971. (195-6) At no time did he view a lineup.

JOHN JACKSON observed two men enter the bank and pass on either side of him. His back was toward the teller's counter. The first, identified as appellant, was a light-complexioned black, with a very high Afro haircut and sunglasses. He could not recall if the perpetrator had a moustache.(167-8) The witness was facing the front door during the entire incident, and never turned around, but kept his eyes moving. (164) He noticed a third man enter the bank, wielding a shotgun, ordering customers about, and directing his weapon from side to side. Jackson watched this man (who was later identified as Danny Washington), who was located between himself and the front door, during the entire robbery, which encompassed six to eight minutes. (164, 172, 213) He was also watching the handguns, shotgun, and everyone in the bank. (209, 210) During the robbery, appellant entered the vault area of the bank and remained there for about three minutes, beyond the witness' observation. (166)

Subsequent to the robbery, he provided a description of the first man, who he identified as appellant, but was unable to describe the other two, except as Negro males, darker than the first, and wearing sunglasses. (204)

Six to eight weeks after the robbery, without observing any photographs, Mr. Jackson identified Government's exhibit 1 as the individual who vaulted the counter. (157-9) He testified that prior to his viewing of the spread, he knew suspects had been arrested and money recovered as the result of conversations. (174, 175) However, in September of 1971, he testified that he did not learn those facts until after

observation of the photos. (178)

When shown the spread of photographs, he took a "good look" at them, removed Government's exhibit 1, but continued to look at the others. (186) Although he signed the report saying the picture was identical to the robber, he did not use that word, but merely said, "This is the man." (203)

Special Agent ALAN DI BONA commenced a surveillance at 3:00 PM on June 3rd from a Times Square Store parking lot located at the intersection of Loring Avenue and Elderts Lane in Brooklyn. (302) The object of this activity, conducted with other agents, was a green Buick convertible parked 100 yards across Elderts Lane in a "Projects" parking lot, which had been identified as a car used in the robbery. (275)

During the day, the agents received a description of the robbers, the substance of which DiBona could not remember, except that three "Negroes" were wanted and that there was probably no description of the clothing. (298-300, 305) That same afternoon a radio dispatch was received stating that John Boston and Danny Washington had been implicated in the bank robbery. (303, 315) There was no information that they might be in any vehicle. (297, 306) At no time was an application made for an arrest warrant or search warrant for appellant. (297)

At 2:30 AM on June 3, 1971, the witness observed a gypsy taxicab drive down the street and park on Elderts Lane between the two parking lots, seventy-five years from the

surveilled Buick. (306) The driver left the vehicle, entered the Times Square Store parking lot, and urinated. He returned to the vehicle, after which the passenger left and went across the street to the Buick. He opened the right passenger door and leaned in. He then walked to the front of the car and lifted his arms. (278-9) He immediately returned to the taxi which made a U-turn and returned in the direction from which it had come. (280) As it was turning its lights were extinguished. At no time was appellant, the driver, observed near the green Buick. (307)

By this time, ten minutes had elapsed since the first observations relative to the cab. The agents rushed the cab in their cars, terminating its progress by cutting it off in the middle of the street. (308) Agent DiBona and his partner Agent Porter exited their automobile and approached the cab with guns drawn. (309-10) Agent DiBona ordered appellant to leave the vehicle and asked his name, to which appellant responded "James Grayhart". (281) Appellant and DiBona were face to face, with Porter at appellant's side. No frisk was conducted, but Agent Porter demanded written identification. (311-12) Appellant silently handed his wallet to Agent Porter who searched it and found a license with the name "John Boston" inscribed thereon. (315) Appellant was asked whether that was his name, to which he answered affirmatively. He was placed under arrest for the robbery. (281) He was advised of his rights, his wallet was retained as evidence, and a sum of currency was confiscated. (283)

Agent WILLIAM JONES was the Special Agent of the FBI in charge of the investigation of the robbery. He had spoken with some of the witnesses and through other agents, obtained descriptions of the robbers,* from which a composite was distilled and broadcast an hour after the robbery.(751) The broadcast description was a broad one, the substance of which he could not remember. (711, 716, 719, 720) However, it did not contain all specifics of the descriptions given by individual witnesses.

Later on June 2nd, at about 6:00 PM, he received information from two agents, Ken Lovin and Mike Lavelle that they had been told by a third person that Boston and Washington confessed to him their participation in the robbery. (513, 549-553) A request by defense counsel that the name of the informant be revealed and that the basis for the information be established was never granted. (549-553) In fact, testimony, either in open court or in camera was never elicited despite repeated applications by defense counsel, and the judge in his ruling with respect to the omnibus motion apparently disregarded the information. ( ) In any event, at no time was an arrest warrant or search warrant procured or application therefore made with respect to either John Boston or Danny Washington. (554-555)**He then directed that the

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*Descriptions received from Grace Walker (1st male-Negro, 20's, 5'11", medium build, black Afro; 2nd - slim, shorter, 5'5", black hair); George Intellisano (1st male - 5'8"-9", thin build, short Afro, 20's, moustache to corners of mouth; 2nd - mid 20's, short black Afro, 6'2"; 3rd - early 20's, approximately same description as 2nd); John Jackson (1st - 5'9", black male in mid 20's, light complexion, pointed face; could not give description of other two except for darker complexion than the 1st); John Dente (all three 5'9", black males, black hair, mid 20's).

**The only warrant applied for during this entire incident was for the arrest of Stephanie Paige Baker, apparently after the search of her apartment. (553)

information that John Boston and Danny Washington may be involved in the robbery be broadcast. (555)

On June 3rd, between 2:00 and 2:30 AM, he received a communication stating that John Boston and Danny Washington had been arrested. (513) He went to the location of their apprehension and took appellant into custody. En route to the FBI headquarters, he apprised appellant of his constitutional rights pursuant to Miranda but did not ask him if he was willing to waive any rights. (514, 563) When they arrived at FBI headquarters, at about 3:35, he again apprised appellant of his rights. Appellant refused to sign a consent form. (518) At about 4:00 AM he commenced questioning appellant in his office, and it continued until 7:30. (564) He was not permitted to sleep and remained in the office during that time. (564-565) During the questioning, appellant provided pedigree information including 1212 Loring Avenue as his residence. (520) He denied complicity in the robbery. (517) At no time did agent Jones inform appellant that he had been implicated in the robbery by an informant. (576) Agent Jones observed that appellant wore a moustache and had a scar above his left eye. (575)

Later, at about 7:00 AM, Agent Jones was telephonically informed as to $80,000 being "discovered" in a bedroom of Stephanie Baker's apartment. (521) Without informing him of his rights, he confronted appellant with this development, to which appellant replied: "Well you got me" and proceeded to confess his participation in the robbery. (522)

Three or four days later, Agent Jones learned that appellant's mugshot had appeared in a newspaper. (585) Although the mugshot might be released to newspaper reporters upon request, only Assistant United States Attorneys and law enforcement officials had access to them. (582) He learned further that the FBI had issued a press release regarding appellant's apprehension. (584) Appellant was indicted on June 17, 1971 but at no time did Agent Jones conduct a lineup containing the appellant. Instead, without ascertaining whether any of the witnesses had seen the newspaper photograph, or whether Government's exhibit 1 was identical to the newspaper photograph, he presented Joseph Dente with a spread of photographs on August 4, on August 16 he showed them to John Jackson, and in September to George Intellisano. (578-586) Although Agent Jones informed the Assistant United States Attorney in 1971 that he had shown the photographs to Mssrs. Dente, Jackson and Intellisano, the Assistant exhibited them again to the witnesses. (595)

The Search of 1212 Loring Avenue

At about 6:00 AM on June 3rd, Agent Jones dispatched FBI agents to various locations including 1212 Loring Avenue, appellant's residence, a Logan Street address in Brooklyn, and to 468 Cleveland Street. (566-8) No search or arrest warrants were procured, nor applications therefore, made. Appellant's consent to search 1212 Loring Avenue had not been requested. They were not told to search premises but to look for the alleged third participant, "Bill". (568-9)

Two of the agents directed to the Loring Avenue address were Alan DiBona and JAMES F. MURPHY, who was in charge of the

four men. Between 7:00 and 8:00 AM, they went to the pertinent address accompanied by Eugene Crouch and Michael Campbell. (294) Although they may have possessed shotguns, neither Agents DiBona nor Murphy could remember. (317, 686) Agent Murphy knocked on the door which was answered by Stephanie Baker. Agent Murphy stated that they were FBI agents and asked if she knew Boston. She replied that he was her half brother. He further informed her that they were conducting an investigation of a bank robbery and "we would like to search the apartment." (681)

The men entered the apartment, and observed Miss Baker in a bathrobe, alone save for a child or children. (318, 319, 687) When Agent DiBona entered the apartment, he stood "right near" the front doorway. (322,327) Then four of the Agents accompanied Miss Baker to the kitchen where Miss Baker sat down at the table. (688) Agent Murphy read a consent to search form to her, she read it and signed it. (323) At no time did Agent DiBona leave the hallway-kitchen area nor search the apartment. (329) At no time was Miss Baker told that John Boston had been arrested. (687) During the course of the search items subsequently introduced at trial were seized. These included two attache cases containing $80,000, some of which was "bait" money, and a money wrapper on which appellant's fingerprint was purportedly found.

STEPHANIE BAKER, John Boston's sister, testified that on June 3, 1971, she was living in an apartment at 1212 Loring Avenue, when FBI agents came to her door, knocked, identified themselves, and promised to break the door down if she did not

open it. Four men, armed with "long guns" pushed open the door. Miss Baker was barely able to don a bathrobe. They commenced to search the apartment. (894) She did not orally or in writing knowingly consent to the search. In fact, the only papers she remembered signing were presented to her after the search was completed, when she was given an inventory of items seized. (895-6) Present in the apartment were her three children, one of whom was asleep and the other two walking about the rooms. She was afraid during the incident. (901)

JOHN BOSTON, THE APPELLANT testified that prior to his arrest, Danny Washington, on Cleveland Street, had entered his rented taxicab and directed appellant to drive him to the Projects on Eldridge Lane. (922) When they arrived there, both left the car; appellant walked to a parking lot and urinated and lost sight of Washington. (922) Having been told by Washington to wait for him, he did so. The next time that appellant saw him, after they both alighted from the cab, was when Washington re-entered the taxi, explained that the back door was locked, and directed him to drive to the front entrance. (923) Inasmuch as the road appeared to be a dead end, he made a U-turn, without extinguishing his lights, and within twenty-five to thirty feet two cars pulled in front of his car and one behind, forcing him to stop. (914) Two persons with guns told him to exit the cab and put his hands on top of the cab. They then searched him. (915) After acknowledging that he had initially provided a wrong name, he stated he was John Boston. He was placed in handcuffs. (915)

Without being apprised of his constitutional rights, he was taken to FBI headquarters and questioned. (918) He stated his residence was 1212 Loring Avenue where he had been living with his sister. (916) At about 7:00 AM Agent Jones entered the interrogation room with two suitcases. He said they were found at defendant's apartment and he further said, "you see what's in here?" Appellant then said, "Yes". Agent Jones responded, "Well, this is your sister's money or your money? This is a horse of a different color now." (917) Appellant thereupon stated, "It's mine. Leave her alone." Only then was he shown a waiver of rights form which he declined to sign. (918) He never consented to a search of the 1212 Loring Avenue apartment nor appeared in a lineup.*

DANIEL WASHINGTON testified that when agents approached the car on June 3rd when he was arrested with John Boston, their guns were drawn and pointed at him and Boston inside the car. They ordered him out of the car and threatened to kill him if he moved. (846, 866) They then searched him, with his hands on the car. Boston was also told to exit car and put his hands on top of it. (865)

JEROME HAMPTON, appellant's brother, testified that on June 3rd, 1971, he was residing at 468 Cleveland Street, at which time it was searched by FBI agents. (866) They told him

*Assistant United States Attorney Anthony Accetta testified at the hearing but not at the trial. Therefore his testimony has not been reviewed. However, here pertinent, he testified at p. 831, that appellant importuned him to refrain from prosecuting his sister.

to get out of bed, identified themselves, and explained that they did not need a search warrant and proceded to search his apartment without his consent. (887)

MINNIE MILLS, who had been John Boston's girlfriend before 1971, was in June residing at 468 Cleveland Street, having terminated their close relationship. On June 3, 1971, she was getting out of bed in the early morning when agents forcibly entered her apartment and conducted a search without a warrant or consent. (890-1)

HATTIE MOSS HINKSON

As a result of this prospective witness' incapacity, she was unable to attend court. Consequently, Assistant United States Attorney, Stephen M. Behar and defense counsel for appellant, David W. McCarthy spoke with Ms. Hinkson at her home and entered into a stipulation which follows: It is stipulated between the United States of America by Edward John Boyd, V, through Steven Behar, Assistant United States Attorney, and the defendant John Matthew Boston, by David McCarthy, Esq., his counsel, that if Hattie Moss Hinkson were called to testify, she would state:

One, that she was employed by the National Bank of North America on June 2nd, 1971, at the time of the robbery that is the subject of this case.

Two, that on June 4, 1971, she saw the newspaper article in the Daily News, Defendant's Exhibit A in evidence and brought said newspaper article into the subject bank.

Three, that she showed that newspaper article to other employees of the bank in question.

Four, she did not recall showing that newspaper article to John Jackson.

Five, that she did testify in front of Judge Rayfiel in this matter on September 13, 1971, to the effect that she did show the newspaper article to John Jackson..

Six, that her memory was better then than it is now, and,

Seven, that at that time she assumed that she showed it to John Jackson and she had shown it to others. (910-11)

Her prior testimony contained within p. 151 of the hearing held before Judge Rayfiel was offered for identification and the Judge ruled that he would consider it. (912)

DECISION OF JUDGE WITH RESPECT TO OMNIBUS MOTION TO SUPPRESS

Warrantless arrest June 3, 1971, John Boston.

By questioning the validity of his warrantless arrest the issue arises as to whether the FBI agents had sufficient information, independent of any statements made by an unramed informant, to believe that Defendant Boston had committed the bank robbery under investigation.

The Court finds that the arresting officer had required probable cause to arrest Boston. This decision is based upon the physical descriptions of the robbers that the arresting agents had been given, the fact that the agents had been given a description of the getaway car and its license number, the peculiar and suspicious conduct of defendant and another person observed by the agents, and the fact that the defendant gave false identification to the agents upon being questioned.

Items seized during June 3, 1971 arrest, John Boston: The defendant contends that all evidence seized after the arrest should be suppressed solely because the arrest was made without probable cause. The Court, however, has held that the arresting agents had sufficient probable cause to arrest Boston.

Therefore, defendant's motion to suppress evidence seized is denied.

Items seized at 1212 Loring Avenue: On June 3, 1971, a warrantless search of the premises at 1212 Loring Avenue, Brooklyn, New York, was conducted by approximately six FBI agents. The Government reasons that the warrantless search of the apartment was valid because of the consent of Stephanie Baker, tenant of the apartment.

Based upon the testimony and the demeanor of the witnesses, the Court finds that Stephanie Baker knowingly, intentionally and voluntarily consented to the search of her apartment.

The agents testified that they had informed her of her rights before the search and that she by both oral and written statements gave her consent.

Defendant's motion to suppress is denied.

Statements given by John Boston to FBI Agent Jones and Assistant United States Attorney Accetta: Defendant based this motion on two grounds.

One, that he was not apprised of his Miranda rights prior to making any statements.

Two, that statements made by him were the immediate result of the illegal search conducted at the 1212 Loring Avenue location.

In view of the Court's finding that the warrantless search was valid, defendant's second ground is untenable.

As for the Miranda rights objection, the Court finds, on the basis of the demeanor of the witnesses and the testimony adduced that defendant Boston had been properly advised of his Miranda rights.

Accordingly, defendant's motion is denied.

Identifications: The defendants seek to suppress the photographic identification of them by three bank employees, Joseph Dente, John Jackson and George Intellisano. Defendant Boston's picture was identified by all three witnesses approximately three months after the robbery had occurred. The photograph of Boston used in the spreads was identical to the one that had appeared in local papers several days after the robbery in connection with an article reporting the arrest of two of the bank robbers and the recovery of $80,000.

Defendant Moore's photograph was identified approximately eight months after the robbery. The spread of pictures shown to Mr. Dente contained several pictures that had been previously included in the spread used for the identification of defendant Boston.

Based upon the testimony and all the other evidence in the record, the Court finds that the photographic identifications were not so impermissibly suggestive as to give rise to a substantial likelihood of mis-identification, Neil vs. Biggars; United States ex rel. Gonzalez vs. Zelker.

All the witnesses testified that they were able to observe the defendants during the commission of the robbery for some five to eight minutes. No masks or disguises were used by the robbers.

Boston's photographic identification occurred three months after the robbery. Each of the witnesses was certain of his identification of Boston.

Moore's photographic identification occurred eight months after the crime. The identification procedure was not suggestive and the witnesses were sufficiently certain of their identification. (949-952)

THE TRIAL

The testimony adduced at the trial corresponded for the most part with that taken at the hearing. The topics of questioning were the same. In an effort to reduce redundant matter, only that testimony of witnesses which was new or different from the hearing will be alluded to.

JOHN JACKSON testified that he watched the robber with the shotgun during the entire robbery. (1014) But he also saw Boston walking in and out from behind a partition seven feet high. (1019) After Mr. Dente went to the vault area, the next he saw the robbers was as they left. (995) He acknowledges having told the agents after the robbery that the man he identifies as appellant had no moustache, (1023) and that he was wearing a high Afro and sunglasses but could

not remember the length of his sideburns or the type of clothing he was wearing. (1023-1025)

JOSEPH DENTE identified a list of "bait" money as that retained by the Bank as a memorandum of relevant serial numbers. (1072) He could not recall which of the perpetrators ordered him to the vault area, however, whichever one it was, he saw him for less than a minute. (1113, 1114) As he recalled, none of the robbers had a moustache and could not recall whether any were wearing glasses. He, in fact, had no present image of the man he identifies as John Boston. (1080, 1082, 1104)

DAVID LOUIS MOORE, co-defendant Ernest Moore's brother, testified that he had been arrested and charged with aiding and abetting in the June 2nd robbery. (1130) He had been given a green Buick by his employer and failed to return it. (1133) He was importuned by his brother to let him use the car, and on June 1, 1971, had seen his brother and John Boston with the car. (1140) Later, he saw Boston wiping the car with a piece of cloth. He asked appellant what he was doing, to which appellant replied that he was wiping the fingerprints off. (1142)

He also testified to his lengthy prior record, including convictions for grand larceny, and he acknowledged numerous falsehoods, including the possession on at least two occasions of licenses with another person's name, with the intent to deceive.

JAMES R. MURPHY AND MICHAEL F. CAMPBELL testified to the seizure at 1212 Loring Avenue. Agent Murphy stated that a comparison of the money found as a result of the search revealed forty bills which matched the "bait" money list. Michael Campbell, when in one of the bedrooms and accompanied by Agent DiBona, saw on the floor three bank wrappers with the name of the bank imprinted thereon, and a piece of a yellow manila envelope which CURTIS OAKES testified contained a latent fingerprint. A comparison of the fingerprint with appellant's revealed that one print was identical. (1228, 1221, 1293-1303) The wrappers, the piece of yellow paper, and the money were marked into evidence.

AGENT WILLIAM JONES testified that after taking the appellant into custody he apprised him of his rights, and appellant said nothing in response. (1245) Later, at FBI headquarters, he again apprised him of rights and immediately commenced questioning him. (1246) He then related as he had at the hearing the events which lead to appellant's purported confession.

AGENT ALAN DI BONA related the events leading to appellant's arrest on June 3, 1971. With respect to the stopping of the auto, he testified: "It made a U-turn and started to proceed up the street at which time myself and another agent in one car and the other two agents in the other car cut the car off. Myself and another agent went up to the driver and order them --- I ordered them out of the car. He got out." (1307)

He further testified that he never went into the bedroom of the apartment but saw Miss Baker give a suitcase to one of the other agents, ten to fifteen minutes after they arrived and five to six minutes after the consent form was signed. (1312).

After the last witness, the Government rested (on its laurels). A motion to dismiss was denied. On behalf of appellant the stipulation previously reproduced regarding Hattie Moss Hinkson, was, verbatim, read to the jury as well as a portion of her testimony in September 1971.* Appellant rested; codefendant Moore rested. The motion to dismiss for failure to prove appellant guilty beyond a reasonable doubt was denied.

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*Testimony taken September 13th, 1971, before Judge Rayfiel, p. 151:

"You clipped it out of the paper?
"Question: Were there other employees in the bank that had also clipped it out, that you know of?
"Answer: I don't know.
"Question: Did you show it to Mr. Jackson?
"Answer: Yes.
"Question: When did you show it to Mr. Jackson?
"Answer: The nedt day after I saw it in the paper."...
"Question: When you showed it to Mr. Jackson, did Mr. Jackson say anything to you about this photograph?"
"Question: The question is, do you know what he said?
"Answer: I do not recall what Mr. Jackson said." (1326)

The next day the summations were delivered as well as the judge's instructions of Law. Appellant took exception to the "accomplice charge" which follows:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of an accomplice alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.
>
> p. 1427

After jury deliberation, appellant was convicted of both counts charged.

POINT I

APPELLANT'S ARREST WAS WITHOUT PROBABLE CAUSE AND IN VIOLATION OF THE FOURTH AMENDMENT

At the time of the agent's rush of the vehicle appellant was driving, aside from the alleged informant's statement*, they had no information whatsowever connecting appellant to the June 2nd robbery. The broadcast of descriptions had been broadcast, and the observations at Eldert's Lane with respect to appellant himself were innocuous and insufficient to establish probable cause.

The focus for determining the existence of probable cause is the credible information available to the agents at the moment of arrest. Beck v. Ohio, 379 US 89, 91, 85 S. Ct. 223. In United States v. Llanes, 398 F. 2d 880 (1968), this Court defined probable cause:

> Officers are said to have 'probable cause' to arrest if at the moment of arrest the facts and circumstances, within the knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that (the subject of the arrest) had committed or was committing an offense. Beck v. Ohio, supra at 91, 85 S. Ct. at 225.

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* In view of the Judge's decision that probable cause existed without the informant's information and refusing to grant defense counsel's request for the informant's name and the circumstances he purportedly obtained the proffered information under, it is respectfully submitted that probable cause must be determined as did Judge Costantino, without considering the informant's statement. Clearly Aguilar v. Texas, 378 U.S. 108 (1964) and Whiteley v. Warden, 401 U..S. 560, (1971) are not satisfied by this record. Assuming that the arrest occurred when the agents learned that the cab driver's name was John Boston, McCray v. Illinois, 386 U..S. 300 (1967) requires the disclosure of the informant. Minimally, Aguilar, requires some evidence establishing the informant's reliability and that of his information. This is not a Draper v. United States, 358 U.S. 307 (1958) situation where the confluence of the detailed information with observations corroborated the informant's allegations.

It is uncontroverted that upon Danny Washington's return to the car, after a U-turn,at least four agents in at least two cars terminated the taxicab's movement by forcing it to stop, by driving directly into its path and cutting it off. At that, the agents alighted from their cars and approached the cab with guns drawn. Both the passenger Danny Washington and appellant, apparently the driver of a vehicle for hire, were ordered from the vehicle. Whether appellant was placed against the car and searched or the agents version of surrender of his wallet to agent Porter is credited, it is indisputable that when ordered to leave the vehicle, appellant was under arrest. The recent Supreme Court decision in United States v. Robinson, 94 S. Ct. 467, and Gustafson v. Florida, 94 S.Ct. 488, are inappropriate as they involve arrests for which there was probable cause. There are no allegations that alleged traffic violations caused the arrest of appellant, if indeed, Federal authorities possess authorization to arrest for traffic violations.

Chambers v. Maroney, 399 U.S. 42 (1970) is distinguishable from the facts present here. The officers in Chambers had specific information including a description of the car and occupants. And, unlike the testimony here, the number of men and their description corresponded with those in the auto. Furthermore, the detailed information upon which the officers relied was obtained from the victim himself and two eyewitnesses, who were concededly reliable. The proximity in location and time to the robbery, circumstances not applicable here, were powerful evidence of complicity.

In Henry v. United States, 361 U.S. 98 (1959), federal agents observed what they considered suspicious actions concerning a person

about whom they possessed information indicating that he was involved in illegal activity. They observed cartons being placed in a car that drove away with the agents following. Shortly thereafter, the agents waived the car to a stop. The Supreme Court held that at that time when the arrest was made the issue of probable cause focused on the stop. Henry, supra, at p. 103. See also Moran v. United States, 404 F.2d 666 (1968):

> If a suspect is interrupted and his liberty of movement is restricted by the arresting officers, then arrest is complete. Henry v. United States, supra.

The specific inquiry therefore is whether at the time the agents stopped the taxicab and ordered appellant to alight therefrom they possessed sufficient information to balieve appellant had committed or was committing a crime.

None of the agents knew appellant and the time of observation was not corroborative of complicity. Draper v. United States, 358 U.S. 307; Raffone v. Adams, 468 F.2d 860, 865 (2d Circ. , 1972).None knew whether appellant possessed an arrest record, nor could they have known that Washington and he possessed any but a purely business relationship as passenger and cabbie. Cf United States v. Olsen, 453 F.2d 612, (2nd Circ., 1972). There was no attempt at flight.

Although, in the District Court, the Government agents testified to a description of the three perpetrators, that was broadcast during the day of June 2nd and ensuing of June 3rd, this evidence was unprobative. No agent could testify as to the substance of the broadcast. Moreover, the agent in charge of the investigation, Special Agent William Jones, acknowledged that the description was general. This is not surprising, inasmuch as the

description was a distillation of all those given by witnesses, and corresponded in detail to none of them. More significantly, however, no agent, at any time, testified that the description broadcast was considered in arresting appellant or that he fit the description, whatever its substance. Although, as argued above, the arrest occurred before any inquiries were directed toward appellant, the agents own recitation of the fact that appellant told he was under arrest occurred not upon an observation of him outside the taxi, or face to face after their apprehension, but after the search of appellant's wallet and removal of a license with the name "John Boston." This reveals that the agents themselves did not rely upon the description. Cf Draper v. United States, supra.

The extinguishment of headlights when making a U-turn on Eldert's Lane is offered as furtive activity constituting circumstantial evidence, corroborative of guilty knowledge. In the totality of the circumstances, the extinguishment of headlights is unprobative. The initial arrival of appellant's taxicab was open and uh surreptitious. There was no attempt to conceal himself. The lights were lit and appellant parked more than fifty yards from the green Buick in a clearly observable location between two parking lots. Moreover, his actions personally revealed no concealment of either his identity or presence. By the time appellant had walked fifty to seventy-five yards through the parking lot, and Washington had travelled the same distance to the parking lot, concealment of presence was an unlikely motive. Indeed, at that point, the action might very well have been motivated by preventing the piercing and disturbing headlights from penetrating the privacy

of the project apartments as they turned. However, the agents could not have known who the source of this action was. It is the nature of a vehicle for hire, as this taxicab appeared to be, that the driver adhere to the order of the passenger. For all that appeared at that time, appellant was merely acting at the direction of Washington.

While it might be argued that the circumstances indicated the cabdriver's complicity, his only observed abnormal action was the ambiguous extinguishment of light. Perhaps momentary detention and inquiry were appropriate. Cf United States v. Brady, 421 F.2d 681 (2nd Circ., 1970). However, the forceful and conclusive actions of the agents exceded the mere investigatory stop approved in Terry v. Ohio, 391 U.S. 1. Indeed, at no time did any agent state they believed they were in danger. In fact, their actions reveal to the contrary. Although Terry approved a protective frisk of the suspect, under specific conditions, none was attempted here until appellant was informed that he was under arrest.

The observations revealed only appellant's presence with one who had approached and investigated the surveilled vehicle. Assuming probable cause as to Washington, presence of appellant does not constitute culpability. United States v. Di Re, 332 US 581, 68 S.Ct. 222. United States v. Del Toro, F. 2d (2nd Circ.,1972) (Where agents had an arrest warrant for companion, who, when searched, possessed cocaine, no probable cause for Del Toro).

However, assuming the agents could disregard the apparent status of appellant as a mere cabdriver, this does not establish probable cause with respect to the June 2nd robbery, almost twelve hours earlier. Even assuming knowledge of Washington's activities with respect to the green Buick, complicity in the robbery is not

inferable. To any observer, Washington's conduct revealed nothing concerning the robbery. He merely appeared to be entering and leaving an automobile, not obviously an instrument of a crime. Washington's actions did not even rise to the level of dominion and control, Chambers v. Maroney, supra . In United States v. Collins, 439 F.2d 610(D.C. Circ.,1971), the Court observed that presence in a vehicle used in a robbery with one matching the description did not establish probable cause. Here presence was established in a taxicab, not the getaway car, under circumstances where appellant's observed actions could not indicate awareness of Washington's actions or intent. The only reasonable inferences to be drawn from appellant's observed conduct was that of a cabdriver earning a living.

Even assuming the arrest of appellant did not occur until he was identified as John Boston, it was still in violation of the fourth amendment. At the time he was stopped, his liberty was restricted such that demand for a license and subsequent surrender of the wallet were clearly submission to authority, and having occurred prior to the arrest, and therefore not incident thereto, the arrest was based upon evidence illegally seized and consequently, a violation of the Fourth Amendment. United States v. Como, 340 F.2d 891 (2nd Circ. 1965); United States v. Mapp, 476 F.2d 67 (2d Circ., 1973).

The arrest of appellant being illegal, the seizure of the items in his possession including his wallet and money were in violation of the fourth amendment.

POINT II

THE SEARCH OF 1212 LORING AVENUE WAS IN VIOLATION OF THE FOURTH AMENDMENT. AS THE GOVERNMENT FAILED TO ESTABLISH AN INTELLIGENT KNOWING AND VOLUNTARY CONSENT TO SEARCH, THE WARRANTLESS SEARCH WAS CONDUCTED WITHOUT EXIGENT CIRCUMSTANCES AND THE ITEMS SEIZED WERE "FRUIT OF THE POISONOUS TREE".

a. Stephanie Paige Baker did not intelligently, knowingly and intentionally consent to a search of the apartment.

At the time of his arrest, appellant was residing at 1212 Loring Avenue. In the morning of June 3rd, during questioning, he acknowledged his residence. Later, agents of the FBI travelled to the Loring Avenue address. There, four agents entered the premises, apparently armed with shotguns or rifles, as well as hand guns, and, in effect, obtained, under duress, a purported consent to search the apartment.

There is no question that appellant has standing to object to the objects which ultimately were seized at that address. Not only did his sister, Stephanie Baker, testify that he was living there, but she also acknowledge that he compensated her while residing there. At no time was this testimony contradicted. In United States v. Jeffers, 342 U.S. 481, the defendant's aunt had given him permission to leave some of his possessions in her hotel room. The Supreme Court stated Jeffers was a party aggrieved and consequently had standing to contest the constitutionality of the search. See also United States v. Mapp, 476 F. 2d 67 (2nd Circ. 1973).

In United States v. Marotta, 326 F. Supp 377, SDNY (1971),

District Court Judge Edelstein summarized the preliminary legal principles involved in determining the validity of a purportedly consensual search:

> The principles involved in the analysis of whether consent was given are well-established. "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was in fact, freely and voluntarily given." Bumper v. North Carolina, 391 U.S. 543, 548, 88 S. Ct. 1788, 1792 (1968).The Government must show that the consent was unequivocal and specific and not "the product of duress or coercion, actual or implicit." United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962) cert. denied 372 U.S. 906, 83 S. Ct. 717, 9 L.Ed.2d 716 (1963). The consent must not be illusory. When the alleged consent is considered within the context in which it was given it must prove to be more than an acquiescence or submission to authority or force. E.g. Bumper v. North Carolina, supra; Waldron v. United States, 95 U.S.App. D.C. 66, 219 F.2d 37 (1955); United States v. Gross, 137 F. Supp. 244 (S.D.N.Y.1956). Finally and importantly, consent by a defendant to a search or seizure is not to be lightly inferred; the Government's proof must establish such consent by clear and convincing evidence. E.g. United States v. Como, 340 F. 2d 891 (2d Cir. 1965); United States v. Lewis, 274 F.Supp. 184 (S.D.N.Y. 1967). (326 F.Supp at p. 380)

In Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 LEd2d 797 (1968), the Supreme Court stated that permission to search a defendant's house, by his grandmother was constitutionally nonconsensual. Four police officers arrived at the defendant's house and were met by his grandmother. After being falsely told that the officers had a search warrant for the house, the woman said "Go ahead". No threats were made, no physical coercion occurred, nor psychological pressure applied. The Court in effect ruled that a search based upon a false claim of authority to search, implying no right to resist, is coerced.

The testimony at the pre-trial hearing was in direct contradiction as to the chronology of events on June 3rd at 1212 Loring Avenue. When the agents went to the apartment at least three and one-half hours after appellant's arrest, they had neither a search or arrest warrant. Although Agent Jones testified that the other agents had been sent to the address to investigate as to the location of the third member of the robbery team, neither of the two participants in the search, Agent DiBona and Agent Murphy who was in charge of the team, ever testified that their purpose was investigation. Reluctant to verbally concede an intent to conduct an exploratory, warrantless search, their testimony with respect to their actions revealed unequivocally their clear intent. Agent Murphy revealed that after identifying themselves, he asked Stephanie Baker whether she knew appellant, to which she replied in the affirmative. She further explained that he was her half brother. After indicating that they were conducting an investigation regarding a bank robbery, at no time informing her that appellant had been arrested therefore, he testified that he said: "we would like to search (her) apartment". At no time did he relate that inquiries were made as to a "Bill" or whether anyone else was in the apartment, although information regarding his location was their main concern.

Present with Murphy and DiBona were two other agents. Although neither Murphy nor DiBona could remember whether they had rifles or shotguns with them, Miss Baker, the lone adult present in the apartment, clothed only in a bathrobe, remembered that

they had "long guns". Agent Murphy recalled that present also in the apartment was at least one child. Miss Baker, uncontradicted, stated that there were three.

After their initial conversation at the door, the four men, at least two of whom were white and presumably all, either forcibly entered the apartment or Miss Baker stepped back providing them access. Agent DiBona testified that when he entered, he stayed in the hallway, by the door. The others entered the kitchen, where, purportedly, Miss Baker was asked to consent to a search of the apartment.

Miss Baker, the only other adult present during this incident, testified that the agents forced their way into the apartment, and commenced an immediate search without her consent and that she did not remember signing any consent form, although she signed some papers, including a receipt for items seized before the agents left. In any case, she signed nothing before they commenced their search.

The coercive nature of the confrontation with Miss Baker vis a vis four armed adult law enforcement officials, under the circumstances of this case, cannot be vitiated by signing of a piece of paper. Initially, as Judge Waterman observed in United States v. Smith, 308 F.2d 656 (2nd Circ. 1962):

> When a law enforcement officer knocks at the door, identifies himself, and asks to be allowed to search the premises, the acquiescence thus obtained is generally not considered to be voluntary consent. (at p. 663)

Miss Baker, barely clothed and confronted at an early hour of the morning by four armed men, identified as FBI agents expressing a

desire to search the apartment was hardly in a position to assert her rights. Their position of dominance, if not apparent by that time, was conclusively established when Agent DiBona took a position commanding entrance and egress from the apartment. Whether any threat was verbally made or command verbally assumed, the actions of the agents were clear and assertive, indicating a clear restraint of Miss Baker's movements. Henry v. United States, supra. In Amos v. United States, 255 U.S. 313, 41 Sup. Ct. Rptr 266 (1920), collectors of internal revenue service confronted the defendant's wife with their intent to serach for "violations of the revenue law", She opened the store and the agents conducted a search. The Supreme Court stated:

> The contention that the constitutional rights of the defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make a search of it under governmental authority cannot be entertained.. for it is perfectly clear that under the implied coercion here presented, no such waiver was intended or effectual. (emphasis added) (at p. 268)

See also, Johnson v. United States, 333 U.S. 10, 68 S.Ct. 36; Schneckloth v. Bustanante, 93 S.Ct. 2041, 2048 (1973).

Unlike the defendant in United States v. Thompson, 356 F.2d 216 (2nd Circ. 1965), Miss Baker was not given advanced notice by telephone of the agents momentary arrival at her door, nor did she respond to the agents with the consensual jargon noted in Thompson of "Come on in", "Go ahead", or "all right", in response to requests to enter and search. Rather, consistent with her testimony that she was afraid, her actions were revealed to be constrained, her answers, when given, short. Indeed, she did not even complete the

form purportedly proffered, she merely signed it. Her fear was the more real, and her acquiescence more comprehensive because of the presence of children in the apartment confronted with four armed, business-like and intent agents. This is not a case as United States ex rel Combs v. LaVallee, 417 F.2d 523 (2d Circ. 1969), where the occupant might merely have been embarassed , or was acquainted with the intruders. Indeed, not even in Bumper, supra, was the officers actions as threatening and the circumstances of the purported consent so coercive as here.

Indeed Miss Baker, in a state of fear, surrounded in the kitchen by at least two and perhaps as many as four armed men, concerned for her children, without assistance or companionship, found her options limited. She had every reason to believe that her position as the focus of governmental pressure toassent to a search would be alleviated by the signing of a piece of paper. Moreover, her fear was exacerbated being scantily clothed in the presence of four commanding and presumably white males. United States v. Kapp, supra at p. 76. See United States v. Como, 340 F.2d 891 (2d Circ. 1965), (where a mere deception by agents vitiated consent).

The circumstances of the confrontation between Miss Baker and the armed agents in the early hours, scantily clothed, presented with a clear and unequivocal desire to search the apartment, unsupported by other adults, concerned for the safety of her children, reveals that she acted in submission to clearly observed and assertive authority. The Government has failed to meet its burden of establishing a knowingly, intelligent and voluntary consent.

b. The search of 1212 Loring Avenue was a "planned, warrantless search", made without exigent circumstances and therefore, in direct contravention of the Fourth Amendment.

It is uncontradicted that no application for a search warrant was made with reference to 1212 Loring Avenue. This failure reveals a clear intent to circumvent the requirements of the fourth amendment. Indeed the events of the morning of June 3rd reveal a concerted plan to search any and all apartments connected in any way with John Boston or his relatives.

The preferred status of warrants as opposed to warrantless searches has been clearly established. Warden v. Hayden, 387 U.S. 298; Camara v. Municipal Court, 387 U.S. 523; Vale v. Louisiana, 399 U.S. 30. Indeed, a search conducted without a warrant is per se unreasonable, subject only to a few clearly delineated and jealously guarded exceptions. Katz v. United States, 389 U.S. 347 (1967). The burden is on the Government to show exigent circumstances required by the warrantless search. Coolidge v. New Hampshire, 403 U.S. 443 d (1971). In United States v. Resnick, 455 F.2d 1127 (5th Circ. 1972), the Court said:

> We have again recognized the stringent burden upon the Government of bringing itself within one of the narrowly drawn exception and of showing that the exigencies of the situation made it imperative to proceed "outside the judicial process without prior approval by judge or magistrate."

At the time of Agent Jones' communication with appellant, he possessed sufficient information with which to obtain a search warrant. Not only had the observations referred to in Point I been made, although not in themselves constituting probable cause, the

informant's information and an obvious confession by Danny Washington. Moreover, certainly early in the conversation, Agent Jones became aware of appellant's address and should have made at least minimal efforts to apply for the warrant. See United States v. Lisznyai, 470 F.2d 707 (2d Circ. 1972). Instead, agents were dispatched for the clear purpose of searching appellant's residence, his sister's residence, his brother's residence, and even his ex-girlfriend's residence. All without warrants, all without prior applications and the latter two, at least, without probable cause. This demonstrated a concerned and planned action of warrantless searches, intentionally circumventing the necessity for intervening and analytical prior judicial determination. Davis v. Mississippi, 394 U.S. 721 (1969).

This scheme of "planned warrantless searches" is in direct violation of Coolidge v. New Hampshire, supra. Undoubtedly, it will be contended that the consent vitiated any prior failure to obtain a warrant. It is submitted, aside from the contentions contained in Point II , that Coolidge teaches that subsequent action, apparently within one of the exceptions to the warrant rule, does not vitiate a prior intentional neglect to obtain a warrant. There, the automobile seized was within "plain view", one of the traditional exceptions to the warrant rule. The Court, however, invalidated the seizure of the auto and subsequent search because the authorities had the opportunity to obtain a warrant but failed to do so.

Like Coolidge, the agent in this case had sufficient opportunity to seek a warrant. Appellant's questioning commenced

at 4:oo AM at least three hours before the agents were dispatched. Kaufman v. United States, 453 F. 2d 798 (8th Circ., 1971). In fact much of the relevant information that could be presented to a magistrate was known before questioning, including the asserted informant's allegations. The rationale suggested in United States v. Mapp, supra, does not apply here. Although appellant purportedly was entitled to the one phone call, at the time, prior to the seizure he was apparently cooperating with the agents, and there is no evidence that he requested such a phone call. Furthermore, the Agents revealed no fear of a call directing the destruction of the evidence inasmuch as they did not make an immediate search of the apartment, but waited at least four hours after arrest. In VAle v. Louisiana, supra, the Supreme Court invalidated a warrantless search of the house outside of which one of the residents, an accused drug seller, had been lawfully arrested. The Court suppressed the seized evidence notwithstanding the contention that since Vale's relatives had returned to the house, exigent circumstances existed as they might destroy the evidence. Clearly, the Supreme Court is concerned with more than a speculative allegation of an emergency when confronted with the serious invasion of privacy occasioned by a house search.

The record here reveals conduct which the Supreme Court condemned, inferentially, in Johnson v. United States, 333 U.S. 10:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement...the support of the usual inferences which reasonable men draw from evidence. Its protection

> consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. Crime, even in the privacy of one's own quarters, is, of course, or grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonable yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agency.

c. The search of 1212 Loring Avenue was "conducted through the exploitation of the original illegal arrest" (see Point I)

Subsequent to his arrest appellant revealed the location of his residence. Obviously this revelation lead the agents to consider and then effectuate a search of the premises which revealed the items requested to be suppressed.

The ultimate seizure of the items resulted solely and directly from the statements made upon appellant's arrest, and were exploited in that the agents actually conducted a search based thereon. The items seized therefore, were the prohibited "fruit of the poisonous tree" and should be suppressed. Wong Sun v. United States, supra.

POINT III

UNDER THE TOTALITY OF THE CIRCUMSTANCES, INTRODUCTION OF THE IDENTIFICATION TESTIMONY WAS A VIOLATION OF DUE PROCESS AND APPELLANT'S RIGHT TO A FAIR TRIAL, AND A VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHT, HAVING BEEN THE DERIVATIVE RESULT OF AN ILLEGAL ARREST AND SEARCH AND SEIZURE.

As the result of an extraordinary desire for publicity, law enforcement agencies have often unnecessarily insinuated prejudice into criminal proceedings. Nowhere is this insidious intervention more obvious and more prejudicial than in this case. For no apparent reason, other than publicity, appellant's photo, replete with explanatory material, some of which was false, appeared in at least one newspaper two days after the robbery. Not surprisingly, one of the bank's employees, Hattie Moss Hinkson, saw the article and picture, carried it to the bank and displayed it to the other employees. The ensuing prejudice was clear and irreparable, and, as the record clearly establishes, solely caused by either the United States Attorney's office or some other law enforcement agency.

The obvious and real dangers of mistaken identity were acknowledged in the Wade-Gilbert-Stovall trilogy.* The Supreme Court in Wade stated:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. 388 US at p. 228

*United States v. Wade, 388 U.S. 218; Gilbert v. California, 388 U.S. 263; Stovall v. Denno, 388 U.S. 293, (1967)

The Court's observation is valid respecting the ordinary, conventional identification case, where zealous and conscientious law enforcement officials are anxious to apprehend alleged felons. Indeed, the Court itself commented on a source of the danger:

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. Wade, supra at 228.

The Court's understanding of the inherent inaccuracy and possibility for prejudice was not restricted to lineups and showups involving corporal confrontations between suspects and witnesses. In Simmons v. United States, 390 U.S. 377, the Court noted:

> It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indication whom they suspect, there is some danger that the witness may make anincorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.2 The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.3 Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification. 390 U.S. at p. 383-4 (footnotes deleted)

Notwithstanding the problems and pitfalls of identification evidence, particularly with respect to the use of photographs, the Court has countenanced their use based upon two considerations: first, it is

an effective tool with which to apprehend criminals and secondly, the use of photographs relieves the innocent suspects of the embarassment of a face to face confrontation by permitting exoneration after perusal of the photo. Simmons v. United States, supra at p. 384.

In determining whether appellant has been denied due process, as Stovall made clear, the traditional test has been whether the pre-trial photographic identification was so unnecessarily suggestive that it gave rise to a "substantial likelihood of irreparable misidentification." Simmons, supra, United States v. Fernandez (I), 465 F. 2d 638 (2nd Circ 1972).

The record here reveals the release and publication, after apprehension, of a photograph of appellant. (Defendant's exhibit A). A perusal of said photograph, it is respectfully submitted, reveals it is identical to Government's exhibit 1, the mugshot contained within the photographic spread exhibited to the witnesses. Agent Jones clearly and unequivocally testified that the access to the mugshot was extremely limited: only Assistant United States Attorneys and law enforcement individuals. Consequently, the release of the photo and the concomitant prejudice falls squarely and solely on the Government.

That the release and publication of the photo resulted in an impermissible suggestion is beyond cavil. Appellant's photograph was accompanied by an article inaccurately alleging his apprehension in personal possession of $80,000.* The rest of the

*The first sentence of the article reads: "FBI agents and Queens detectives arrested two Brooklyn men with $80,000 on them early yesterday..." (emphasis added) (defendant's exhibit A)

article clearly reveals a belief by authorities of appellant's guilt. The Assistant United States Attorney is quoted as requesting high bail as an additional $105,000 taken during the robbery was still missing, implying a nexes between the seized $80,000 and the proceeds of the bank robbery.

The release of the photo was totally unnecessary as it could not possibly assist in anyone's apprehension. And certainly, the public's right to know, and the deterrent value of the promulgation of speedy apprehension of offenders, is as effectively served by a brief explanation of the arrest,* without the photograph. This Court in United States v. Fernandez (1), supra, found impermissibly suggestive the exhibition of the defendant's photograph with five others when his picture was perceptibly lighter in skin color. No accompanying prejudicial suggestion was noted beyond that contained within the pictures themselves. The aforementioned explanatory article contained within (Defendant's A) was so clearly assertive as to surpass the proscribed Fernandez spread in prejudice. See also, United States ex rel Rivera v. McKendrick, 448 F. 2d 30 (2nd Circ 1971).

The issue of whether the impermissibly suggestive photographic identification procedure created a substantial likelihood of misidentification is resolved by considering only admissible evidence. United States ex rel. Gonzalez v. Zelker, F. 2d (2d Circ 1973). And the burden is upon the prosecution to prove by

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*See Fair Trial - Free Press Rules of Eastern District Rule 8 - 3(1) and Southern District Rule 8 - a(6): effective February 28, 1969 and January 1, 1969, respectively.

clear and convincing evidence that the in court identifications were not the product of the improper identification procedure. United States ex rel Cummings v. Zelker, 455 F. 2d 714 (2d Circ. 1972).

It is abundantly clear that use of the photographs after June 3, 1971, was no longer justified by Simmons, supra. Appellant had been apprehended and was available for a lineup. That the photos were used to bolster identifications is established by the chronology. Prior to indictment on June 17th, appellant's photo was not exhibited to the witnesses who testified. cf. United States ex rel Anderson v. Mancusi; 413 F. 2d 1012 (2nd Circ. 1969). Obviously the agents were not concerned abo ut avoiding undue embarassment with photos rather than a face to face confrontation. The lack of concern with which the possibility of taint was treated is revealed by Agent Jones failure to ascertain whether the photo he intended to display had been the one in the newspaper. And notwithstanding the fact that appelant was in custody, no attempt was made to enable him to appear in a lineup, a procedure recommended by this Court in United States v. Fernandez (1), supra at p. 641, footnote 1; Palmer v. Peyton, 359 F. 2d 199 (4th Circ, 1966).

Without asking whether any of the prospective witnesses had o bserved the tainting newspaper article and photo, Agent Jones, more than two months after the incident and more than six weeks after indictment, firstshowed the photographic spread to Mr. Dente. Unlike United States ex rel Williams v. LaVallee, 415 F 2d 643 (1969), this procedure was not conducted immediately after the

crime, to determine whether the suspect was identified as the perpetrator. This procedure was purely a preparation tool for trial. An indictment has been handed up, the investigation regarding appellant was complete. Displaying the photographs served neither of the purposes condoned by Simmons. Mr. Dente, who described all three robbers exactly alike, and who did not notice any sunglasses or moustache on the man identified as appellant eventually, after perusing the spread two or three times, chose appellant's photograph and said, "I think this is the man who jumped the counter". This was far from a spontaneous identification. As this Court said in United States ex rel Phipps v. Follette, 428 F. 2d 912 (1970):

> ...initial uncertainty would tend, although again not conclusively, to a fear that the witness was relying on the image formed at the legally impermissible confrontation. (at p. 915)

It is also noteworthy that when Mr. Jackson was shown the photographs he did not instantly choose appellant's mugshot. Although he removed it from the spread, he continued looking at the other photos. Relevant as well, is that despite Mr. Jackson's repeated denials of seeing any newspaper photo, Ms. Hattie Moss Hinkson, two and one-half months later, distinctly remembered showing the picture to him. His identification, in view of his position in the bank, continuously with his back toward the teller's counter where he stated appellant was located, is suspect. Moreover, he stated that he continuously watched Washington and his gun, both being between Jackson and the fron door, and directly opposite the teller's counter.

In any event, the initial viewing of the spread was followed before the September, 1971 hearing, with one if not two further viewings. Those exhibitions, particularly in view of Agent Jones' admonition that the pictures had been shown before, were unwarranted and an exacerbation of an already grave course of tainting the identification of the witnesses. As Judge Friendly noted in United States ex rel Phipps v. Follette, 428 F 2d 912 (2nd Circ. 1970):

> Also, a long interval between the initial observation and the trial coupled with an improper confrontation a comparatively short time before the witness appears in court enhances the danger that he might be relying on his most recent encounter.

The effective tainting established by the published photo and repeated viewings, was clearly shown by Mr. Dente's statement that while he perused the photographic array twice or three times upon first observing it, the second time, later in time, and therefore assuredly with a weaker image of the perpetrator, he only needed one view to choose Boston's picture.

Under the totality of the circumstances of this case, viewing the evidence in the light of only that admissible (see points I and II supra), prior to the spread and during its exhibition, the conduct clearly created the likelihood of misidentification.

It is respectfully submitted, however, that aside from that standard, in the circumstances of this case and exercising its supervisory powers, this Court should reverse the conviction and

direct the exclusion of identification evidence in view of the calculated, repeated and irreparably prejudiced governmental conduct, which from the publication of the mugshot in the newspaper denied the appellant even the possibility of a fair trial, and was more egregiously exploited by the repeated post-indictment exhibitions of the same photographs.

a. The identification testimony constituted a violation of the Fourth Amendment.

Furthermore, the use of the photograph (Government's exhibit 1) was "fruit of the poisonous tree" having been obtained as the result of appellant's initial illegal arrest. Silverthorne v. United States, 251 US 385 (1920); Davis v. Mississippi, 394 US 721 (1969); Wong Sun v. United States, 371 US 471; United States v. Edmons, 432 F. 2d 577 (1970).

The photograph was not merely obtained subsequent to and as a result of appellant's arrest but was exploited both by its release and publication in the newspapers and secondly, by its specific and prejudicial exhibition to robbery witnesses. The evidentiary line from the mugshot to the in-court identification was clear and direct, with no intervening attenuation. United States v. Edmons, supra. Consequently, the identification testimony was derivatively obtai ned directly as a result of the initial illegal arrest and its introduction constitutes a violation of the Fourth Amendment. Wong Sun v. United States, supra.

POINT IV

THE ALLEGED CONFESSION OF APPELLANT WAS TAKEN IN VIOLATION OF HIS FOURTH AND FIFTH AMENDMENT RIGHTS AND, THEREFORE SHOULD HAVE BEEN EXCLUDED FROM THE TRIAL.

A. There was a failure by the Government to show a waiver by appellant of his Fifth Amendment rights.

It is the Government's "heavy burden" to prove that the accused waived his right to counsel. United States v. Du Shane, 435 F.2d 187 (2d Circ. 1970).

In support of this "heavy burden" the Government presented testimony to the effect that the appellant neither signed a waiver of his Fifth Amendment rights nor orally waived said rights prior to the custodial interrogation by Federal Agents which eventually resulted in the extraction of the alleged confession.

In Miranda v. Arizona, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), the Supreme Court, in discussing what may be considered as a waiver of a defendant's Fifth Amendment rights, held:

> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply by the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . . Miranda v. Arizona, supra., at page 475. (emphasis added).

Here, there is more than mere silence of appellant but, rather, an affirmative refusal of the appellant to waive his constitutional rights as evidenced by his refusal to execute the written waiver. In United States v. Ramos, 448 F.2d 399

(5th Circ. 1972) the defendant was given the opportunity to read all the "Miranda" warnings from a card and, after stating he understood all of his rights, refused to execute a written waiver thereof. Despite this refusal the Federal Agents continued their interrogation and eventually extracted a confession. The Fifth Circuit, in reversing the conviction, noted:

> Once warnings have been given the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. 384 U.S. at 473-474, 86 S.Ct. at 1627. United States v. Ramos, supra.

In United States v. Speaks, 453 F.2d 966 (1st Circ. 1972), certiorari denied 92 S.Ct. 1522 (1972) the Court ruled that the absence of a written waiver did not necessarily preclude the introduction of a confession into evidence if it could be shown that the accused orally waived his Fifth Amendment rights. Therefore, Speaks, supra., and Ramos, supra., taken together seem to clearly indicate that there must be some affirmative waiver by the accused before custodial interrogation can proceed. Here, the Government has failed to show a waiver, written or oral, by appellant and, clearly, there can be no waiver presumed from the mere fact that a statement was given, Miranda v. Arizona, supra., at p. 516.

The Supreme Court of the United States prior to its ruling in Miranda, and reaffirmed therein, held:

> Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which shows, that an accused was offered counsel but, intelligently and understandingly rejected the offer. Anything less is not a waiver. Carnley v. Cochran, 369 U.S. 505,516, 8 L.Ed.2d 70,77, 82 S.Ct. 884 (1962).

See also, United States v. Forlano, 319 F.2d 617 (2d Circ. 1963).

The record clearly establishes the failure of the Government conduct to meet the standards set forth in Carnley, supra. Agent Jones testified that appellant remained silent after each advisement of his constitutional rights (there were two) and that after the second the agent immediately began to question appellant. Thus, not only did appellant not engage in any conduct that could be construed as a waiver of his rights but, Agent Jones did not give appellant the opportunity to decide his course of conduct.

In Glasser v. United States, 315 U.S. 60, 86 L.Ed 680, 62 S.Ct. 457 (1942), an Assistant United States Attorney was prosecuted for soliciting bribes from violators of the Federal liquor laws. A question arose as to whether Glasser, by his silence, could be held to have waived his right to counsel. The Court, in rejecting such an argument, held:

> To preserve the protection of the Bill of Rights for hard pressed defendants we indulge every reasonable presumption against the waiver of fundamental rights. citation ommitted. Glasser, supra., at page 70.

More appropriate are the above words to the case at bar wherein the appellant is not an attorney and who, by refusing to sign the waiver form affirmatively asserted his Fifth Amendment rights. Ramos, supra.

Therefore, the Government failed to sustain its "heavy burden" to establish appellant's waiver of his fundamental rights and, therefore, the alleged confession

was taken in violation of his Fifth Amendment rights and should have been excluded by the Trial Court.

B. The alleged confession was the direct and proximate result of an illegal search and seizure and should have been excluded as fruit of the poisonous tree.

After appellant's arrest his sister's apartment was searched, without probable cause (see Point II, supra.) and approximately $ 80,000.00 was recovered therefrom. It was not until appellant was confronted with the fact of this recovery that he gave the confession at issue herein.

The confession, therefore, was the fruit of the illegal search and seizure conducted by Government operatives and, as such, should be suppressed, Elkins v. United States, 80 S.Ct. 1437, 4 L.Ed.2d 1669, 364 U.S. 206 (1960).

It is settled that the exclusionary rule regarding violations of the Fourth Amendment is not restricted in its application to those tangible objects or intangibles, such as confessions, gleaned as the direct result of the prohibited government activity. In Silverthorne v. United States, 251 U.S. 385 (1920), the Government intended to make use of copies, governmental agents had made, of illegally obtained books and records, notwithstanding the Court-ordered return of the originals as illegally obtained. The Government wanted to use the copies in its investigation and prosecution of the defendant. In rejecting the Government's argument that the Fourth Amendment applies only to the originals, the direct result of the search, the Court said:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all. Silverthorne, supra., at p. 392.
>
> See also Nardone v. United States, 308 U.S. 343 (1939); Wong Sun v. United States, 371 U.S. 471, 484 L.Ed.2d 441, 453, 83 S.Ct. 407

While evidence ultimately found as the result of an illegal search is not, by that fact alone, suppressible, the test as stated by the Supreme Court in Wong Sun, supra., 371 U.S. at p. 488, 9 L.Ed.2d at p. 455, is:

> Whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Essentially, therefore, as stated in Wong Sun, if the evidence is obtained from an "independent source" Silverthorne Lumber Co. v. U.S., supra, or the relationship between the original illegal activity and the eventual "fruit" of that proscribed conduct has "become so attenuated as to dissipate the taint." Nardone v. U.S., 308 U.S. 338, 341, 84 L.Ed 307, 312, 610 S.Ct 266, it is not suppressible.

The exploitive use to which the illegally seized items were put is clear in this case* wherein the record reveals that the confession immediately followed the appellant's confrontation with the fact of the seizure at his sister's apartment.

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*The illegality alleged herein is two-fold: (1) the taint arising from the illegal search and seizure and (2) the taint arising from appellant's illegal arrest on Elderts Lane.

It is the Government's burden to show that the unlawfully obtained evidence did not adduce the confession. Harrison v. United States, 392 U.S. 219, 224, 88 S.Ct 2008, 20 L.Ed.2d 1405. Here the Government made no showing that the appellant's confession would have been otherwise procurable had it not been for the use of the illegally obtained evidence. In fact, the record reveals that during the three and one-half hours of continuous interrogation the appellant was steadfast in his maintenance of his innocence and that he did not confess until immediately after the illegally seized evidence was brought to bear.* In United States v. Edmons, 432 F.2d 577 (1970), the Second Circuit noted:

> The Government 'exploits' an unlawful arrest when it obtains a conviction on the basis of the very evidence, not shown to have been otherwise procurable, which it hoped to obtain by its unconstitutional act. (at p. 584).

In United States v. Tane, 329 F.2d 848 (1964), the Second Circuit affirmed the District Court's dismissal of the defendant's indictment as the product of an illegal wiretap. The identity of the main witness against Tane was gleaned from an illegal wiretap. Although the Government argued that the witness' testimony was an "intervening voluntary act," in effect, cleansing the taint, the Court noted that the first evidence of wrongdoing had been obtained from the wiretap and had been used to impel the witness to testify.

Similarly here, the illegal search (and arrest) was the initial illegal acts which impelled the appellant to confess.

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*The coercive conduct of the Government agents will be discussed in subdivision "c" infra.

Consequently, it cannot be argued that the appellant's confession would have been obtained from an independent untainted source. Absent the illegal arrest (See Point I, supra.) and the illegal seizure there would have been no confession. As the Second Circuit aptly noted in the Tane case:

> The road form the (tap) to the testimony may be long, but it is straight.

Here, the road from the illegal arrest and search is short, straight, and inextricably entwined to the confession.

In any event, the State patently failed to sustain its burden of showing that the primary illegality "did not lead, directly or indirectly," to the trial testimony, U.S. v. Tane, supra, 853, or the confession as herein.

Therefore, it is respectfully submitted that the appellant's confession should have been excluded from the trial as "fruit" of the initial illegal search and seizure and unlawful arrest and the confession should have been suppressed by the trial Court.

C. The alleged confession was the direct result of coercive conduct of Government Agents and, therefore, should have been excluded by the trial Court.

It is clear that coerced confessions cannot be introduced in evidence against an accused whether said coercion be physical or psychological in nature. Lynumn v. State of Ill., 372 U.S. 528, 9 L.Ed.2d 922, 83 S.Ct. 917; Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745, Shotwell Mfg. Co. v. United States, 371 U.S. 341, 9 L.Ed.2d 357, 83 S.Ct 448, rehearing denied 372 U.S. 950, 9 L.Ed.2d 975, 83 S.Ct 931. Stein v. New York,

346 U.S. 153, 97 L.Ed 1522, 73 S.Ct 1077.

Here it is alleged by appellant that he confessed only after, and as a direct result of, being threatened with the arrest, prosecution, and incarceration of his sister. In Hawkins et al. v. United States, 158 F.2d 652, 81 U.S. App. D.C. 376, certiorari denied, 331 U.S. 830, 91 L.Ed 1844, 67 S.Ct 1347, rehearing denied, 331 U.S. 869, 91 L.Ed 1872, appellant claimed that he confessed only after officers had threatened his relatives with incarceration. The officer admitted making the statement for the purpose of inducing the accused to confess. The record of the trial in Hawkins indicated that the appellants had given various and conflicting versions as to the reason they confessed. The Court, in rejecting appellants' claim, held:

> Even if such a threat was conveyed, it did not make the subsequent confession "involuntary" unless there was a causal connection between the threat and the confession. Hawkins, supra., at p. 653.

Here, unlike in Hawkins, appellant did not testify at trial to a variety of conflicting reasons for his confession, nor did appellant enter into extensive negotiations with the Assistant United States Attorney before making his confession as did the appellants in Hawkins. Additionally, this case provides the "causal connection between the threat and the confession" called for by Hawkins in that the Assistant United States Attorney Accetta testified that appellant consistenly sought the exoneration and release of his sister throughout the interrogation. It should be noted that the ability to bring

the aforementione psychological pressure upon appellant is inextricably entwined with the illegal search and seizure conducted at the sister's apartment. For without that evidence so seized the ability to threaten the sister with arrest could not have validly existed. Needless to say, had the appellant not been illegally arrested, he could not have been placed in the pressurized position he found himself.

The familial pressure brought to bear upon the appellant in order to obtain his confession rendered said confession inadmissible, as the product of coercive governmental conduct, and should have been excluded at the trial of this matter. United States v. Reese, 351 F.Supp 719 (U.S.D.C. for W.D.of Pa. 1972)

Wherefore, based on all the foregoing, appellant respectfully submits that the confession herein was taken in violation of appellant's Fourth and Fifth Amendment rights and the introduction of said statements deprived appellant of due process of law.

POINT V

THE JUDGE'S INSTRUCTION REGARDING ACCOMPLICE TESTIMONY CONSTITUTED REVERSIBLE ERROR

Prior to instructing the jury, Judge Costantino provided counsel with a copy of his proposed charge. Only one exception taken at that time is raised on this appeal.

Judge Costantino's charge regarding accomplice testimony and the care that should be taken in weighing it, conversely declared that appellant "may" be convicted upon accomplice testimony alone. This charge, although appropriate in other circumstances, for instance where the accomplice allegedly participated fully in the actual crime itself, such is not the fact here.

David Moore, the only person who testified who might be considered an accomplice, with respect to appellant, merely testified to access to the green Buick and that he observed appellant wiping the car with a cloth. Assuming no other evidence existed, such proximity to the car, two days before the robbery is clearly insufficient to convict of bank robbery. Therefore, the judge's instruction permitted the jury to convict based upon insufficient evidence, unprobative of the specific crimes charged.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERCIA, Appellee, -against- JOHN MATHEW BOSTON and ERNEST MOORE Appellants	Docket No. 74-1451 AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
SS.:
NASSAU COUNTY)

DAVID W. McCARTHY, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at 265-24 74th Avenue, Floral Park, New York. That on the 28th day of June, 1974, deponent served the within APPELLANT'S BRIEF and APPENDIX upon the United States Attorney for the Eastern District of New York at 225 Cadman Plaza East, Brooklyn, New York; and upon Gustave Weiss, Esq, attorney for Ernest Moore, at 1540 Broadway, New York, New York, the addresses designated by said attorneys for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

David W. McCarthy

Sworn to before me this 28th
day of June, 1974.

Martin S. Dorfman
Notary Public

MARTIN S. DORFMAN
Notary Public, State of New York
No. 41-6078830
Qualified in Queens County
Commission Expires March 30, 1976

NOTICE OF ENTRY

Sir:- Please take notice that the within is a *(certified)* true copy of a
duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

McCARTHY & DORFMAN

Attorneys for

Office and Post Office Address

SUITE 310
1527 Franklin Avenue
MINEOLA, N. Y. 11501

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

McCARTHY & DORFMAN

Attorneys for

Office and Post Office Address

SUITE 310
1527 Franklin Avenue
MINEOLA, N. Y. 11501

To

Attorney(s) for

Index No. 74-1451 Year 19

UNITED STATES COURT OF APPEALS
FOR SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN MATHEW BOSTON and
ERNEST MOORE,

Appellants.

AFFIDAVIT OF SERVICE BY MAIL

McCARTHY & DORFMAN

Attorneys for APPELLANT BOSTON

Office and Post Office Address, Telephone

SUITE 310
1527 Franklin Avenue
MINEOLA, N. Y. 11501
(516) 746-1616

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

STATE OF NEW YORK, COUNTY OF

CERTIFICATION BY ATTORNEY

The undersigned, an attorney admitted to practice in the courts of New York State, certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

Dated: .....

STATE OF NEW YORK, COUNTY OF

ATTORNEY'S AFFIRMATION

The undersigned, an attorney admitted to practice in the courts of New York State, shows: that deponent is

the attorney(s) of record for
in the within action; that deponent has read the foregoing
and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: .....

STATE OF NEW YORK, COUNTY OF ss.:

INDIVIDUAL VERIFICATION

, being duly sworn, deposes and says that
deponent is the in the within action; that deponent has
read the foregoing and knows the contents thereof; that
the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

CORPORATE VERIFICATION

, being duly sworn, deposes and says that deponent is the
of the corporation
named in the within action; that deponent has read the foregoing
and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.
This verification is made by deponent because
is a corporation. Deponent is an officer thereof, to-wit, its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF SERVICE BY MAIL

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 deponent served the within
upon attorney(s) for
in this action, at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

Sworn to before me, this day of 19 .....

STATE OF NEW YORK, COUNTY OF ss.:

AFFIDAVIT OF PERSONAL SERVICE

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the day of 19 at No.
deponent served the within
upon
the herein, by delivering a true copy thereof to h personally. Deponent knew the person so served to be the person mentioned and described in said papers as the therein.

Sworn to before me, this day of 19 .....

CONCLUSION

FOR THE ABOVE-STATED REASONS APPELLANT'S MOTION TO SUPPRESS SHOULD BE GRANTED, HIS CONVICTION REVERSED AND THE INDICTMENT DISMISSED OR ALTERNATIVELY A NEW TRIAL ORDERED.

Respectfully submitted,

DAVID W. MC CARTHY, ESQ.
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(516) 746-1616